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ABSTRACT

Factors affecting the acceptance by the courts of teacher employment policies involving competency testing are examined in this report. Policies in 55 states and territories are considered, and the wide variations among the policies and court interpretations of them are noted. Particular attention is paid to constitutional provisions regarding equal protection of the law and due process, and to federal law regarding civil rights. The report recommends that tests be validated and used with caution. Relevant court cases are cited. A table listing the requirements, responsible agencies, and specific state legislation related to teacher certification in each state is appended. (PGD)

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Note: This paper is a working paper. The case law discussion is complete, but the table and discussion based on the table may contain omissions due to the difficulty of compiling information on 55 very different jurisdictions. Please use the tabular material with care. Second, if you identify such an omission for a state please notify Patricia Lines, including a citation to statutory material or a copy of regulations. We will be very grateful.

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Employment tests have at least two virtues: they produce quantitative results and they eliminate subjective and possibly unfair personal bias. But they may measure the wrong things; they may contain their own bias; or they may be otherwise poorly designed. They are one-dimensional, measuring only knowledge. Tests for teachers fail to measure important characteristics that make for an effective teacher — such as compassion, love of children, energy, wisdom, or dedication. Nor do tests solve such problems as the shortage of bright, able teachers.[1] Indeed, tests that screen out prospective teachers will reduce the available pool, and there is no real assurance that those who pass will be better than those who don't, by any standard other than their ability to take tests.

Recognizing their advantages and limitations, courts will accept tests as valuable assessment devices; with several reservations. Most important, courts will scrutinize decisions that are based on test results for equity and fairness. Thus, the goal of the legal system is that of any good employment testing procedure — to obtain the best assessment possible, and to omit from consideration irrelevant information such as race, sex, religion, or personal biases.

Virtually all of the litigation concerning teacher testing focuses on the National Teacher Examination (NTE) developed by the Educational Testing Service (ETS) in Princeton, New Jersey. Other tests exist, such as the one developed by California, but the NTE, most widely used, has received the most attention. The NTE measures the minimum amount of knowledge an individual should possess on entry into the teaching profession. ETS does not recommend it for any other use. ETS also recommends against arbitrary cutoff scores, and sets no such score itself, leaving it to the state to determine appropriate minimum requirements. The courts tend to listen to these recommendations, but, on the whole, the courts are not as strict as ETS. Some courts limit their inquiry, and judicial approval of a test procedure does not necessarily mean that the procedure is wise public policy. It means only that courts have found the procedure to meet basic constitutional requirements for equity and fairness.

State Policies on Teacher Testing

The table in the appendix to this article outlines state requirements for entry into the teaching profession. Of 55 jurisdictions, 54 require public school teachers to obtain a certificate by legislative mandate. Only the District of Columbia does not, prefering to leave the matter to school board regulation. As can be expected with any review of practices in 55 jurisdictions, approaches vary widely. There are also similarities: Not only does every state (as well as Puerto Rico, Guam, the Virgin Islands, and American Samoa) require a certificate to teach in public schools, every jurisdiction, including the District of Columbia, gives its state board or other state agency either general or specific authority to determine standards above and beyond the statutory minimum. Such policy choices generally reflect a desire to permit flexibility and detailed consideration of the issues beyond that which legislators can give. The boards have in fact achieved uniformity in requiring a four-year degree, but the requirement for

professional education courses and clinical experience vary.[2]

None of this should be suprising. States operate in different economic and social environments. It is irresponsible to suggest, as have some,[3] that national standardization is needed to overcome these differences in policies, without showing how the differences are harmful. Variation among states, standing alone, does not make the case.

Testing of teachers is also universal, although most of it is not standardized. That is, virtually all states require a postsecondary degree. Thus, passing a battery of tests (tests used to determine pass/fail status in college courses) is a universal requirement for new teachers. However, differences among institutions, coupled with the widespread practice of "grading on a curve" in college classes, destroy the usefulness of college grades as a standardized measure of teacher competency.[4]

Partly owing to this lack of standardization in college graduation requirements, more and more states are considering additional testing to screen applicants to the profession. In 1981, Hall and Houston had identified 17 states that used or were considering some kind of competency-based teacher standards. By 1983, Sandefur reported that 36 states planned or had adopted a testing program.[5]

As is shown in the appendix, by 1984 17 states had adopted a general or limited testing requirement for new teachers in their statutes; 2 (Utah and Missouri) had authorized state boards to require a competency test (although neither have done so); and 8 more had testing by virtue of state agency decisions. Four of the states with limited testing provisions in their statutes have comprehensive testing by board regulation. In addition, the Kentucky legislature has created a statutory committee to study teacher assessment and to make recommendations by 1985. At least 14 more states are considering general competency tests.[6] The Iowa legislature passed such a testing law, but it was vetoed. Many statutes actually specify use of the NTE, allowing for other options at board discretion. California has developed its own test, which Colorado also uses.[7] Some of the testing requirements are limited in subject matter (as in New Jersey). All in all, however, the trend in state legislation is toward stricter statutory standards, with delegation of responsibility to set additional standards to the state board or chief state school officer.

Equity

The Fourteenth Amendment

The fourteenth amendment to the U.S. Constitution requires governments to give all persons "equal protection" of the laws. Although Court interpretation of this clause is complex,[8] it can be simplified for the present discussion:

- The equal protection clause permits distinctions between individuals so long as the distinctions are rational and have a legitimate purpose.
- It does not permit race- and sex-based discrimination among teachers.
- When a test has a disproportionate impact on women or minorities, courts will investigate to determine whether the test is being properly used to distinguish between the qualified and the unqualified, or improperly used for a hidden discriminatory purpose. Most litigation focuses on this third point.

These general criteria make it possible to find a testing program unconstitutional because of race or sex discrimination, but proving wrongful intent may be difficult. For example, in Washington v. Davis,[9] the U.S. Supreme Court accepted the District of Columbia's use of a test, neutral on its face, as a screening device for police recruits, although the procedure disqualified a disproportionate number of blacks.[10] The Court specifically refused to apply the stricter standards that apply under Title VII of the Civil Rights Act of 1964 (discussed below).[11] However, at the same time, the Court indicated that it would accept circumstantial evidence to prove intent, and race or sex imbalance may be an important part of this circumstantial evidence. In the words of the Court, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[12] Applying such standards, some courts have found intent to discriminate in the use of tests under some circumstances. For example, the courts will carefully scrutinize a disproportionate exclusion of minorities.[13]

In rare cases, testing procedures may be unconstitutional because they violate even the most minimal requirements of equity: that the classification be rational. For example, a federal district court found Georgia's use of the NTE to be irrational and arbitrary, where the state required a very high score for teachers to receive six-year certificates, entitling them to more pay. (ETS has specifically recommended against this use of the NTE.) The court found it unnecessary to decide whether or not the test was being used to discriminate against minorities, because it made no sense to have such a high cutoff under any circumstances.[14]

Finally, in school districts subject to a desegregation order, segregation or racial imbalance of faculty at different schools becomes a much more sensitive matter. Racial imbalance among faculty can label a school as "white" or "black." In such cases, the courts may prohibit or limit the use of teacher testing that has a racial impact, because it would have adverse effects on court desegregation orders.[15]

For most cases, however, judges now prefer Title VII over the Constitution as grounds for a decision. The standards are more stringent. Second, judicial preference for statutory over constitutional grounds also requires this result. Thus, following Washington v. Davis, a number of federal judges, many of whom had thought imbalance alone was a violation of the Constitution,[16] revised this position. Courts that were reviewing challenges by teachers to critical personnel decisions based on test results dismissed their cases or proceeded under Title VII (after it was amended to cover state and local government employees).[17]

Title VII: Discrimination in Employment

Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination based on race, color, national origin, sex, or religion, in both the public and private sectors.[18] The statute allows an employer to use "a professionally developed ability test" so long as it is "not designed, intended or used" for illegal discriminatory purposes.[19]

Supreme Court Cases: The leading Supreme Court cases on employment testing under Title VII are not teacher cases, but they provide basic guidelines. In Griggs v. Duke Power Company,[20] the employer required applicants for transfers within the company or for new employment either to have a high school education or to pass a standardized

general intelligence test for virtually any position. The requirement excluded more blacks than whites. After the effective date of Title VII, the company modified its requirements, but as a general rule, a high school diploma and/or passing scores on various intelligence or aptitude tests remained in use. The Court interpreted the Title VII proviso on testing to allow only job-related tests. The lack of discriminatory intent was inconsequential:

> We do not suggest that the courts below . . . erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
>
> . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[21]

The Court interpreted the Title VII proviso on testing to allow only job-related tests, and its final advice is worth repeating:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[22]

The Supreme Court wrestled with test validation in Albemarle Paper Company v. Moody.[23] The company required passing scores on two tests and a high school diploma for employment in skilled areas. On the eve of trial, apparently in response to Griggs, the employer asked an industrial psychologist to study the job-relatedness of the tests. The psychologist found statistically significant correlations between the ratings of supervisors and scores on one test for three job groups; on the other test for four groups; and on both tests for two groups.

The Court found the validation study defective for several reasons:

- Its "odd patchwork of results" showed each test was validated for only some job groupings, not all.
- The supervisorial rankings used as a basis for assessing the test's validity were vague, ambiguous, and devoid of references to specific criteria.
- The study concentrated on higher job groups without showing that employees were routinely promoted to these top positions.
- The study used more experienced workers as its validation group, whereas applicants were bound to be largely inexperienced.[24]

Clearly, the Court is willing to question the evidence offered by experts, and to insist that the validation be a good-faith attempt to measure the potential ability of the applicant.

While Albemarle outlines criteria for identifying an unacceptable validation, Washington v. Davis provides a clue to what might be acceptable. Although the Court decided Washington v. Davis only under the Constitution (because public employees were not yet covered by Title VII), it reviewed validation efforts by a local government for a test administered to screen police recruits. The trial court decided, and the Supreme Court agreed, that the test had been adequately validated, applying Title VII standards. The high court rejected the argument that validation required a comparison to job performance. Instead, it found success in training revelant, pointing out that this in turn is related to the ultimate goal — success on the job.[25]

In 1982, in Connecticut v. Teal, the high court dealt with another aspect of employment testing in a case dealing with a test used to assist in selecting employees for promotion. Connecticut required employees who were candidates for appointments as supervisors to receive a passing score on a non-validated written examination. The test disproportionately excluded Blacks, but the state compensated for this disproportion by promoting more Blacks from those who passed. The "bottom line," the state argued, was that blacks were promoted in the same proportions as whites. In a five-to-four decision, the Court rejected this "bottom line" defense and ruled that the test must be validated for job-relatedness, because it otherwise could result in discrimination against those individual blacks who did not pass.[26]

The Uniform Guidelines on Employee Selection Procedures, adopted in 1978 by the Equal Employment Opportunity Commission (EEOC), and three other federal agencies,[27] provide another helpful source of guidance on these issues. These are only guidelines, however. The Supreme Court has indicated that EEOC interpretations of Title VII are not entitled to the same weight as are agency regulations, i.e., regulations which are promulgated pursuant to a specific legislative instruction from Congress.[28] The guidelines appear accurately to reflect case law up to the time they were written, and they cover some issues that the Court has not addressed. They provide some common sense guidance on validation, drawing not only upon court decisions but on testimony from experts in the field. Nonetheless, the guidelines may be misleading and theCort itself does not necessarily apply them. The guidelines suggest, for example that where final results of a selection process show no adverse impact on a protected group, individual components need not be scrutionized, in normal circumstances.[29] This does not accurately reflect the decision in Connecticut v. Teal, discussed above. It is also instructive that the majority in that case did not even mention the guidelines on this point.[30] Case law remains a more authoritative source for critical issues under Title VII.

Teacher Cases: A number of states using the NTE have undergone litigation under Title VII, with varying results.[31] In one case, North Carolina had required a passing score of 950 as a prerequisite to certification. A three-judge district court (a special court organized to review attacks on state laws, with decisions appealable directly to the Supreme Court) at first found the system unconstitutional. But following Washington v. Davis, the court vacated its own judgment and proceeded to consider the applicability of Title VII. The state had made no effort to validate the test, and could not provide evidence that the cutoff of 950 distinguished competent from incompetent teachers. As a part of a settlement approved by the court, the state has agreed to provide remedial help to teachers who fail the test.[32]

Two years later, these principles were again employed in a case upholding South Carolina's testing program, used to determine pay levels for teachers. The South Carolina program could be considered an early merit pay plan, because test scores classified teachers at different levels, with different pay scales. The teachers challenged the validation effort on grounds that the state had correlated test content with success during teacher training rather than with on-the-job criteria, and that experts agreed that no good measure of on-the-job teaching effectiveness existed. The state had relied on written and validated achievement tests, designed to test for a minimum knowlege needed for effective teaching.

A three-judge federal court upheld the program, and the Supreme Court affirmed the ruling in a memorandum opinion.[33] Justices Byron White and William Brennan dissented, citing the failure to validate against job performance and the NTE's recommendation against use of the test to determine pay. They argued that Washington v. Davis, insofar as it accepted validation to a training program, is to be limited to tests used to gain access to that training. The majority of the Court wrote no opinion, and one might guess that they disagreed on this point, but such guesswork is hazardous. Possibly the Court affirmed because the test did not produce racial imbalance among teachers.

Finally, in a recent case, decided in August of 1983, a federal district court granted a preliminary injunction, until trial, against the use of the NTE by Mobile County schools in Alabama.[34] The district used test scores to determine which teachers should be retained from year to year. The teachers bringing the case had been dismissed because of their scores, which were below the cutoff of 500, although they had received satisfactory ratings from their principals. The use of the test excluded more black teachers than white. The judge relied heavily on ETS's own guidelines, which discourage arbitrary cutoff scores and uses other than identifying those qualified to go into teaching:

> Using the NTE with inservice teachers for determining a teacher's retention, or tenure, status is not a use that was intended for the tests.
>
> The NTE measures academic preparation for teaching, not the act of teaching itself; and the critical criterion in evaluating a practicing teacher is not potential but actual teaching performance. If an adequate and reliable record of a teacher's inservice performance is available, that record should be used.[35]

The court was influenced by this professional advice, and at the same time found inadequate the efforts of the Mobile County Board to validate the test. (District officials examined 290 test scores, with an average of 600, volunteered by some of its teachers; the national mean score of 550; and scores gathered from a few other districts. They then decided to use a score of 500 as the minimum requirement for continuing nontenured teachers and for new hiring. The court was unimpressed.)

Following a change in the NTE test structure, the district revised the rule to accept various results: a score of 500; or a score at or above the 25th percentile on area examinations, the special examinations, a composite score on common and area examinations, or on each area of the core battery. The court held, nonetheless, that the school district was obligated to establish the validity of the test for the intended use whenever it disproportionately excluded a minority group.

Other Federal Laws Requiring Equity

Several other federal statutes might also come into play. Most importantly, Title VI of the Civil Rights Act of 1964 prohibits the use of federal funds in programs that discriminate racially.[36] An express exception makes it clear that the law does not cover discrimination in employment. Training programs are covered, however, and would include federally funded programs in colleges and schools of education, as well as any other federally funded teacher training programs. Federally funded teacher training centers once existed but were consolidated by block grant legislation. If new federal legislation provided for teacher training, it would also be covered. Such legislation is a possibility, given the interest in math and sciences. Title VI would be relevant to teacher testing then, if such testing were used to screen applicants to training programs.

A majority on the Supreme Court has said that Title VI prohibits only intentional discrimination. This was made clear in Guardians Association v. Civil Service Commission, concerning New York City's practice of hiring police based on test scores. (As all recruits went through a training program, Title VI became relevant.) A majority of the Court, in a 7 to 2 decision, held that as intent to discriminate was absent, the statute was not violated.[37] However, a different majority, in a 5 to 4 decision, reasoned that federal agencies have the authority to set grant conditions, including a requirement for racial balance in the funded program.[38] In Guardians, the complaining police officers were able to obtain prospective relief under the regulations; but claims for back pay were denied. Based on the reasoning of only two justices explaining this point, such claims would have to be based on the statute itself, as the agency had no authority to require this very costly form of relief. In short, backpay would be available as a remedy for intentional discrimination.[39]

One teacher testing case (Caulfield v. Board of Education of New York City) has been decided under Title VI. An appellate court refused to overturn an agreement between the city and the U.S. Office of Civil Rights, finding that Title VI applied.[40] The court appeared to base its findings on the impact on students, however.

Since federal regulations for education grants require racial balance in the funded program, a state or local recipient of federal funds is obligated to maintain this balance or forego federal funds. The recipient does not face liability under Title VI for damages stemming from past imbalance, however. Only purposeful discrimination will bring about sanctions more harsh than fund-withholding and an injunction against future wrongdoing.

Title IX of the Education Act Amendments of 1972 prohibits sex discrimination in federal education programs. Like Title VI, it authorizes withholding of federal funds as a sanction. Unlike Title VI, it has numerous exceptions, including, for example, exceptions for traditionally single-sex institutions, religious and military institutions, and beauty contests.[41] Imbalance probably is not actionable, as the law provides that nothing in its broad prohibition "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist . . . ."[42] The New York City case mentioned above rested on Title IX as well as Title VI.[43]

Although it has been consolidated in block grant legislation, the Emergency School Aid Act (ESAA) also is relevant, as Congress often has considered its revival. One case under ESAA has followed the general pattern of Title VI. Because it is a grant program, the courts require racial balance. A federal court has upheld the denial of ESAA funds to New York City because of racial disparities in teacher assignments.[44]

Any program of teacher incentives that fails to consider handicapped teachers has the potential of colliding with Section 504 of the Rehabilitation Act of 1973. This law, also modeled after Title VI, forbids discrimination against the handicapped in federally funded programs. It provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . ."[45] The "remedies, procedures and rights" outlined in Title VI specifically apply by cross-reference in the statute,[46] and any policy that works to disqualify handicapped teachers must be relevant to the legitimate goal of rewarding only excellent teachers.

Fairness

The fourteenth amendment to the U.S. Constitution prohibits states from depriving "any person of life, liberty, or property, without due proces of law . . . ." The overriding purpose of this clause is to protect individuals from arbitrary state action; in a word, to require the state to be fair. For most purposes, this translates into a requirement that no state endanger life, liberty or property without fair procedures.

Teacher testing policies may or may not trigger due process. The Court's must first answer a threshold question - is there anything in the testing policy that injures life, liberty or property? Although some teachers may take a different view, particulary on the eve of a big test, life and liberty do not seem to be endangered. On the other hand, if teacher testing affects job placement, promotion or salary, there may be a property interest, depending on contractual and tenuring arrangements.[47] Probationary employees have no comparable property interest,[48] but in some cases the courts recognize some level of interest.[49]

The need for formal procedures increases in proportion to the hardships caused by the state action, and the nature of the right affected by the action.[50] Thus, loss of a permanent position would require a full, formal hearing. The elements of such a hearing have been described elsewhere.[51] Loss of a probationary position may require some minimum procedure, probably an adequate explanation of the reasons for the decision.[52] A number of state and federal courts have held that teachers have a right to an explanation for termination of probationary employment.[53]

In addition to a formal hearing, testing policies raise some additional issues under the due process clause. Fairness may also require that teachers receive advance notice of a new policy, and that they have access to information about the tests. The law on these points is just now developing, and both deserve some special attention.

Adequate Notice of New Policy

If courts follow the precedent established in cases dealing with new student competency requirements for graduation, they will require states to notify teachers of new testing requirements before they are implemented. The concern for fairness requires advance notice of a change in policy, to give teachers time to prepare for the changes.[54] Specifically if a new policy repeals the old teacher tenure policies in favor of a new policy based on some measures of merit, notice would be needed. The teacher hired under an old policy must be allowed adequate time to prepare for the new requirements. (As an alternative, the teacher could be exempted from the new requirements.) The amount of notice will depend on how teachers contracts are negotiated, the degree the

new procedures vary from old procedures, the number of teachers affected by the new requirements, and similar circumstances. In judicial decisions affecting rules for student competency tests for graduation, where precedent is more developed, courts seem to be moving toward a notice requirement of two or three years, absent special considerations.[55]

It is less clear that notice would be needed for new entrants to the profession, or for new testing requirements for merit pay or promotion. Thus far, in cases dealing with merit pay or career ladders (in postsecondary institutions), courts have not identified any loss of property interest. Student competency testing cases are distinguishable from such cases. Students facing a new graduation requirement were expecting to graduate under more lenient rules. Merit pay or career ladders present unexpected new opportunities.

Access to Information

Another important and unique application of due process in testing policies involves the opportunity to obtain a variety of information about the test, if it is a basis for an adverse personnel action. As a general rule, a teacher facing an adverse decision, such as a dismissal from employment for cause, has a right to know who the witnesses will be and to cross-examine them. Only by obtaining this kind of information can the teacher adequately contest the charges. This general right to discover information has special relevance to discovery of information about a test, if it has been used as a basis for the adverse decisions. In one case, for example, a teacher had been dismissed because expert opinion, after psychological testing, identified the teacher as "hypomanic," "neurotic," and suffering from "psychoneurosis and passive-aggressive personality characterized also by poor judgement and no insight, . . . deemed to impair her ability to perform her duties." The court held that the teacher had a right to inspect the tests and the written record prepared by the district's psychologists who had examined her.[56]

This underlying principle does not necessarily extend to written examinations of teacher competency. As a matter of fairness, a teacher should be able to examine his or her own psychological test results if they provide a basis for dismissal. But releasing correct answers on a standardized ability or aptitude test is another matter. So is the release of test results for all those taking the test, as they may have expected confidentiality. In a case interpreting a general federal requirement that an employer disclose relevant data for personnel decisions,[57] the Supreme Court refused to order disclosure of aptitude tests, although they were used to make employment decisions. On the other hand, legislatures have shown some interest in requiring disclosure of some categories of tests, at least in New York.[58] The New York experience has shown some errors in test construction, but it also places a burden on the testing company to develop a new test at a rapid pace and continually to re-validate new editions of the test.

Conclusions and Recommendations

To be on the safest possible legal ground, public administrators should:

- Validate access tests — that is, compare results with the best available criteria for judging entrants to the field
- Validate all tests used to determine any employment benefit to be sure that they identify the attributes of teachers who should receive that benefit

- Be cautious of using a test for a purpose other than that recommended by the test maker

- Review carefully the use of any test that disproportionately excludes a racial or sexual group from consideration in hiring, promotion, or other employment advantage

- Use other appropriate criteria in addition to the test for decisions relating to promotion, identification of merit teachers, or similar purposes in which the employer is distinguishing among competent teachers. Even though case law seems to allow validation for training, for the sake of preventive law, it seems wise to validate tests against job performance where they are used to determine competency of existing teachers. This includes use of tests to decide who stays on the job and who gets merit pay.

- Review procedures for teacher testing to assure that adequate notice is given to those who will need to prepare for a requirement and that they will have an opportunity to challenge possible errors or abuses in the implementation of a testing procedure.

FOOTNOTES

1. See Gary Sykes, Incentives, Not Tests, Are Needed To Restructure the Teaching Profession, Educ. Week, May 4, 1983, at 24 & 19, for a thoughtful commentary on this point.

2. See C. Emily Feistritzer, The Making of a Teacher, Nat'l Center for Educ. Information (1984).

3. Id. Although the press seems to interpret Feistritzer's report as calling for federal action, she is unclear, for the most part, about who should do what to achieve reform. In her conclusion, she urges "national standards for certifying teachers, including a national proficiency examination . . . ." Id. at 60. Taken alone, this appears to call for Congress and federal agencies to set the requirements. However, Feistritzer then compares her recommended action with the policies already in place for "doctors, lawyers, accountants, and other true professionals." Id. at 60. Since state legislatures, and not Congress, prescribe the requirements for these professions, it seems likely that Feistritzer misunderstands how certification of other professions actually operates. Certification of other professions is a state responsibility and standards vary considerably from state to state. Lawyers, for example, must pass a bar examination, furthermore, the bar relies heavily on nonstandardized essay examinations prepared and evaluated by local members of the bar. As every candidate knows, the level of difficulty varies enormously from state to state. The use of a standardized multiple choice test is relatively new, is not universally required, and varies by state on cutoff scores. Despite this mixed picture, Feistritzer seems to believe that lawyers must pass a national proficiency examination. Id. at 51.

At yet another point Feistritzer calls upon the Secretary of Education to convene a national board of education groups and state officials "to insure that these reforms are enacted." Id. at 61. This statement seems to recommend state legislative action, spurred by moral suasion from federal leaders, but she is not explicit on the point. All in all, these pacticular recommendations seem to be based on rhetoric and intuition rather than data.

4. Carlton H. Stedman, Testing for Competency: A Pyrrhic Victory?, J. of Teacher Educ. 35, no. 2, March-April 1984, at 2.

5. J. E. Hall & W. R. Houston, Competency-based Teacher Education: Where is it Now?, New York Univ. Educ. Quarterly 12, no. 1, Sept. 1981, at 20-27; J. T. Sandefur, Teacher Competency Testing: The Public's Mandate, unpublished manuscript, Western Kentucky Univ., College of Education, Bowling Green, July, 1983. The information on Sandefur's study is found in G. Pritchy Smith, The Critical Issue of Excellence and Equity in Competency Testing, J. of Teacher Educ. 35, no. 2, March-April 1984, at 6-9.

6. See, Patricia Flakus-Mosqueda, working paper no. 2, Survey of States' Teacher Policies, ECS, Oct. 1983, at 34 (Table III).

7. Rona F. Flippo & Carol R. Foster, Teacher Competency Testing and Its Impact on Educators, J. of Teacher Educ. 35, no. 2 March-April, 1984 at 10-13.

8. For a discussion, see Lines, The Supreme Court and Equity Under the Constitition — Review of Recent Cases, 10 Wests Educ. L. Rep. 1 (1983).

9. See Washington v. Davis, 426 U.S. 229 (1976).

10. 426 U.S. 229 (1976).

11. Id. at 247.

12. Id. at 242.

13. E.g., Baker v. Columbus Mun. Sep. School Dist., 462 F.2d 1112 (5th Cir. 1972). The district court had found intent to discriminate against black teachers where a district adopted an NTE combined score of 1000 for hiring new teachers. The appellate court affirmed.

14. Georgia Ass'n of Educators, Inc. v. Nix, 407 F. Supp. 1102 (N.D. Ge. 1976).

15. Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211, 1219 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970) See also Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971); United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 95 S. Ct. 1950 (1975). Cf. Milliken v. Bradley, 433 U.S. 267, 286-87 (1977). But see Pickens v. Okolona Mun. Sep. School Dist., 527 F.2d 358 (5th Cir. 1976) (held, Singleton does not apply as tests were properly validated).

16. See e.g. Walston v. County School Bd. of Nansemond County, Va., 492 F.2d 919 (4th Cir. 1974) for a case that is probably erroneous under the Washington v. Davis standard. See also note 17, infra.

17. In a New York case, where the courts had erroneously assumed that a constitutional violation could be found in the absence of intent to discriminate, the appellate court ordered the case dismissed from federal court, finding it a matter to be decided under state law. Chance v. Board of Examiners, 561 F.2d 1079 (2d Cir. 1977).

Another court, reviewing North Carolina's program of teacher testing for certification and pay purposes, initially ruled the program invalid under the constitution alone. It vacated this judgment and proceeded under Title VII, which had also been in issue, after the Supreme Court decided Washington v. Davis. United States v. North Carolina, 400 F. Supp. 343, 349 (E.D.N.C. 1975), vacated, 425 F. Supp. 789 (E.D.N.C. 1977). The case is discussed in greater detail below.

18. 42 U.S.C. § 2000e (1982).

19. 42 U.S.C § 2000e-2(h) (1982).

20. 401 U.S. 424 (1971).

21. Id. at 431.

22. Id. at 436.

23. 422 U.S. 405 (1975).

24. Id. at 431—35.

25. Washington v. Davis, 426 U.S. 229, 249—51 (1976).

26. Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525 (1982). See also Thomas, The Bottom Line Theory of Defense Under Title VII: Connecticut v. Teal, 13 West's Educ. L. Rep. 9 (1978).

27. 29 C.F.R. Part 1607 (1984). These were also adopted by the Civil Service Commission, 5 C.F.R. § 300 (1984); the Department of Justice, 28 C.F.R. § 50.14 (1984); and the Office of Federal Contract Compliance Programs, 41 C.F.R. § 60-3 (1984).

28. E.g., General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

29. See 29 C.F.R. § 1607.4(C) (1984).

30. The majority cited another uncontested part of the guidelines in a footnote. 457 U.S. 440, 443 n. 4, 102 S. Ct. 2525, 2529 n. 4. The dissent cites the guidelines to support its position on the bottom line defense, again in a footnote. Id., 457 U.S. at 459 n. 4, 102 S. Ct. at 2537 n. 4. Neither opinion gives the guidelines much attention.

31. A number of testing cases are currently pending. E.g. Stanfield v. Turnbow, no. 84-4892, Chancery Ct., Pulaski County, Ark., Nov. 28, 1984; Florida Teaching Profession (FTP) v. Turlington, no. Circuit Ct. Leon City, United Teachers of Dade v. Dade County School Bd., no. 84-44914, Circuit Ct., Dade City, Fla., Dec. 5, 1984. The Arkansas case challenges the testing requirement under state equal protection provisions, because it applies to only some teachers (those in the system in the 1984-85 school year). A bill in the state legislature may make this case moot. The Florida cases challenges the use of testing an other aspects of Florida's new merit teachers and merit schools program. The FTP case alleges that the tests and other criteria are not reasonably related to the statute's objective.

32. The case in United States v. North Carolina, 400 F. Supp. 343, 349 (E.D.N.C. 1975), vacated, 425 F. Supp. 789 (E.D.N.C. 1977). The settlement is reported at Education Daily, July 20, 1983, at 2.

33. United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), aff'd mem., 434 U.S. 1026 (1976).

34. York v. Alabama State Bd. of Educ., 581 F. Supp. 779 (M.D. Ala. 1983). A preliminary injunction indicates that the judge thought that the teachers were likely to prevail at trial.

35. ETS Guidelines, as quoted by the court, id. at 781.

36. 42 U.S.C. § 2000d (1982).

37. 103 S. Ct. 3221 (1983).

38. The seven justices coming to this conclusion were Rehnquist, Powell, O'Connor, Burger, Stevens, Brennan and Blackmun. See id. at 3227, 3236, 3237, 3253, 3240—43. For a discussion see Lines, Intent to Discriminate and Title VI of the Civil Rights Act of 1964: Lau, Bakke and Guardians, 17 West's Educ. L. Rep. 443 (1984).

39. The five justices coming to this conclusion were White, Marshall, Stevens, Brennan and Blackmun. See id. at 3227—28 (by inference), 3244 n. 15, 3254, 3237 & n. 5. White and Rehnquist were the two to expresse the view that retroactive relief would have to

rest on the statute. Id. at 3237. As Powell, O'Connor and Burger would grant relief under no circumstances, their view prevailed. The Court has subsequently cited the Guardians as precedent for granting back pay as a remedy for intentional discrimination. Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1252 (1984) (under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).

40. Caulfield v. Board of Educ., 486 F. Supp. 862 (E.D.N.Y. 1979), aff'd, 583 F.2d 605 (2d Cir. 1978). It was important that Title VI applied, as OCR has no jurisdiction under Title VII. Assignment of teachers was the primary issue.

41. See 20 U.S.C. §§ 1681(a)(3)-(9) (1982).

42. 20 U.S.C. § 1681(b) (1982).

43. Caulfield v. Board of Educ., 486 F. Supp. 862 (E.D.N.Y. 1979), aff'd, 583 F.2d 605 (2d Cir. 1978).

44. Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978).

45. 29 U.S.C. § 794 (1982).

46. 29 U.S.C. § 794(12) (1982).

47. Arnett v. Kennedy, 416 U.S. 134 (1974) (right to continue employment in absence of cases for discharge triggers due process).

48. Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (contract renewal, no property interest).

49. Sinderman v. Perry, 408 U.S. 593 (1972) (same, but 10-year experience implied some agreement and some property interest).

50. The idea of increasing procedures when faced with increased levels of deprivation of property is explained in the student rights case of Goss v. Lopez, 419 U.S. 565 (1975).

51. Belsches-Simmons and Bray, The Legal Context for Teacher Improvement, Education Commission of the States, working paper no. LEC-85-2, Jan., 1985, at 10-11.

52. Id.

53. E.g., in School District #8, Pinal County v. Superior Court, 102 Ariz. 478, 433 P.2d 29 (1967), the Arizona Supreme Court said:

> Since the Legislature did not require 'good cause' for the termination of a contract of a probationary teacher, the purpose of a statement of reasons is simply to point out the teacher's inadequacies in order that she may correct them in the event of subsequent employment. . . . [T]he language of a notice is sufficient if it simply states undesirable qualities which merit a refusal to enter into a further contract.

Montana's Supreme Court has come to the same conclusion. Bridger Educ. Ass'n v. Board of Trustees, No. 83-310 (Mont. 1984). See also Dennis v. County School Board, 582 F. Supp. 536 (W.D. Va. 1984).

54. The requirement of notice was critical in the leading student competency testing case. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), aff'd in part, vacated and remanded in part, 644 F.2d 397 (5th Cir. 1981). The courts found 13 months' notice inadequate to give students time to prepare for a test required for the award of a high school diploma and enjoined the implementation of the test as a diploma requirement for three years. In subsequent review the program (focusing on test validity) was upheld. 564 F. Supp. 177 (M.D. Fla. 1983), aff'd, 730 F.2d 1405 (11th Cir. 1984).

55. See Debra P. v. Turlington, supra (13 months inadequate; graduation requirement postponed for three years); Brookhart v. Illinois State Bd., 534 F. Supp. 725 (C.D. Ill. 1982), rev'd, 697 F.2d 179 (7th Cir. 1983) (1.5 years' notice inadequate); Anderson v. Banks, 520 F. Supp 472 (S.D. Ge. 1981), modified, 540 F. Supp. 761 (S.D. Ga. 1982) (two years notice adequate).

56. Newman v. Board of Educ. of the City School Dist. of N.Y., 594 F.2d 299 (2d Cir. 1979).

57. Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979). The Court was influenced by the inadequacy of the protection for the security of the tests. Id. at 315.

58. N.Y. Educ. Law §§ 341-348 (McKinney Supp. 1983-84). Note New York's law was made somewhat less stringent in 1983, after a few year's experience.

TABLE
STATUTORY REQUIREMENTS FOR CERTIFICATION OF TEACHER IN PUBLIC SCHOOLS

	Academic Requirements	Test Requirements (If test is specified it is in parens)	Other Statutory Requirements	Who sets additional rules?	Board test requirements	Citation
Alabama			"courses of study"	Board	comprehen-sive	Ala. Code sec. 16-23-1 & 14 (1975)
Alaska	BA		special training for teacher of exceptional children; waiver of BA req. in emergency	Board		Alaska Stat. sec. 14.20.010 thru 14.20.250 (1982)
Am. Samoa			good health; good character	Chief		Am. Samoa Code Ann. sec. 16.1001(b), 16.0301 (1981)
Arizona		on constitutions, reading, grammar, math		Board	comprehensive	Ariz. Rev. Stat. sec. 15-332, 15-533, 15-744 (Supp. 1983)
Arkansas		comprehensive (NTE or State Bd. Test)		Board	(see col. 2)	Ark. Stat. secs. 80-1201, 80-1209 (1980 & Supp. 1983)
Califor-nia	for general certif.: BA + 5th year of study within 5 years	subject matter exam	(demonstration of methods of teaching reading)	Comm'n of Teacher Credentialing	(see col. 2)	Cal. Educ. code sec. 44259 (West 1978)
Colorado	BA	comprehensive	professional courses (may be waived in some circumstances)	Board	(see col. 2)	Colo Rev. Stat. secs. 22-60-104, 22-63-103 (1973)
Con-necticut	BA in teacher educ.	on hygiene & effects of tabacco, alcohol & drugs		Board	comprehen-sive, by 1985	Conn. Gen. Stat. sec. 10-145 (West. Supp. 1978-83)
Delaware				Board	comprehen-sive	Del. Code Ann. tit. 14, sec. 122(b)(7)(a) (1982)
District of Columbia	(No statutory provisions; see board regulations.)			Board		

Florida	BA (or over 18)	comprehensive		Board		Fla. Stat. Ann. secs. 231.15, 231.17 (West Supp. 1984)
Georgia			5 quarter hours in special education	Board	content knowledge	Ga. Code Ann. sec. 20-2-282 (Supp. 1982)
Guam	teaching degree			Board		Guam Code tit. 17 secs. 5101-5104 (1982)
Hawaii	BA (class II); BA+ (III-VI); Ph.D. (VII)			Department		Hawaii Rev. Stat. secs. 297-2, 297-4, 297-31.1 (1976 & Supp. 1983)
Idaho	4 years college (2 if emergency)		18 years old +	Board		Idaho Code Ann. secs. 33-1201 thru 33-1203 (1981)
Illinois	BA with educ. courses + 5 hrs. student teach. (elem. teach.) Same + 5 hrs. student teaching in field		19 years old + citizen or intent to be citizen; good health; good character	State super., consulting with state certification board		Ill. Ann. Stat. Ch. 22, sec. 21-1 through 21-3 (Smith Hurd Supp. 1983)
Indiana		for elem. ag., industrial work, home ec.		Board	comprehen-sive, by 1985	Ind. Code Ann. sec. 20-10.1- 6-3 (Burns Supp. 1982)
Iowa				Board of Educ. Examiners		Iowa Code Ann. sec. 257.10(11) (Supp. 1983)
Kansas		1984 status will require comprehen-sive test by May 1, 1986		Board	comprehen-sive	Kan. Stat. Ann. secs. 72-1381, 1382, 1390 (1982)
Kentucky		legislature has required study & report by 1985		Council on teacher educ. & certific. with approval of board		Ky. Rev. Stat. sec. 161.030(3) (1980)
Louisiana	3 hrs of counseling 270 hrs. student teach. 2.2 grade average on 4.0 scale for entry to teacher ed. & on graduation 6 semester hrs. in reading for H.S. certificate & 9 hrs. for elem.			Board	comprehen-sive	La. Rev. Stat. Ann. sec. 17.7 (West 1982)

Maine	training in physiology & hygiene for elem. teachers; spec. training for teaching about drugs			Board		Me. Rev. Stat. Ann. tit. 20-A, secs. 13001, 13003 (1983 & Supp. 1984)
Maryland				Board with the advice of chief; county super. has resp. to classify certificates		Md. Educ. Code Ann. secs. 6-101, 6-103, 2-205(m), 2-203(g), 7-409(b) (1978)
Massa-chusetts	BA or grad. from 4 year normal school and meets academic requirements		citizen; good health & character	Board		Mass. Gen. Laws Ann. ch. 71, sec. 38G (West 1982)
Michigan				Board		Mich. Comp. Laws Ann. sec. 380.1531(1) (West Supp. 1984-85)
Minne-sota	courses in physical and health educ., program on drug & alcohol abuse			Board of Teaching		Minn. Stat. Ann. secs. 125.04, 125.05, 126.02(2), 125.05 (Wests 1979 & Supp. 1984)
Missis-sippi		comprehensive (NTE or comparable test)		Board	(see col. 2)	Miss. Code Ann. secs. 37-9-7, 37-9-9, 37-9-11, 37-3-21 (1972)
Missouri	min. 2 yrs. in city training for public schools; min. 4 yrs. H.S. for others; 2 + semester hrs. in psy. & educ. of exceptional child for life certificate	if state board prescribes it	good character	Board or state coll. & univ.	(see col. 2) (no action to date)	Mo. Ann. Stat. sec. 168.011, 168.021(1), 168.031, 168.022 (Vernon 1965 & Supp. 1984)
Montana	B.A. & completion of teacher ed. prog. min.; BA + 1 yr. for class 1; 4 yr. teacher program + BA for class 2; some other classes also specified		18-70 years old; good health & character	Board		Mont. Code Ann. secs. 20-4-101(1), 20-4-104, 20-4-106(1) (1981)
Nebraska	certification by Board is to be based on earned college credit	in English, reading, writing & math	good mental & physical health; good character	Board	(see col. 2)	Neb. Rev. Stat. secs. 79-1233, 79-1240 (1976) & L.B. 994, April 5, 1984 (to be codified as secs. 79-1247.05 & 79-1247.06)
Nevada			ev. of knowledge of state & federal	Board		Nev. Rev. Stat. secs. 391.020, 391.090, 391.170(2) (1979)

New Hampshire				Board		N.H. Rev. Stat. Ann. secs 186:8 & 186:11(x) (1977)
New Jersey		(in physiology & hygiene with impacts on drug & alcohol educ.)		Board of Examiners	(see col. 2)	N.J. Stat. Ann. secs. 18A:26-2, 18A:6-38, 18A:26-8 (West 1968 & Supp. 1983)
New Mexico				Board	comprehensive	N.M. Stat. Ann. Secs. 22-10 (1984)
New York	state diploma in lieu of certificate			Chief	comprehensive	N.Y. Educ. Law secs. 3001, 3004, 3009 (McKinney 1981)
No. Carolina		comprehensive (on a specified standard exam.)		Board	(see col. 2)	N.C. Gen. Stat. sec. 115C-295 & 296 (1983)
No. Dakota	H.S. teachers must have major or minor in courses taught for most subjects			Chief		N.D. Cent. Code secs. 15-21-09, 15-36-01, 15-36-11, 15-41-25 (1981)
Ohio	graduate of approved inst.; 2 yr course for teachers of K.; 4 yr., all others except for voc. ed. teachers			Board		Ohio Rev. Code Ann. sec. 3319.29 (1980)
Oklahoma				Board	subject area exam.	Okla. Stat. Ann. tit. 70, secs. 1-116(1), 6-101(c), 6-108, 6-156 (West 1972 & Supp. 1982)
Oregon	completion of approved teacher ed. program		must demonstrate knowledge of civil rights, & be of good health & character	Teacher standards and practices comm'n		Or. Rev. Stat. secs. 342.120(8), 342.123, 342.125(1), 342.135, 342.143, 342.165(1), 342.173 (1983)
Pennsylvania	grad. from college, univ. or inst. of learning & completed prof. preparation		18 yrs. old; good moral character; not addicted to alcohol or drugs	Board		Pa. Stat. Ann. tit. 24, secs. 1224, 1225(b), 1231 (Purdon 1962 & Supp. 1984-85)
Puerto Rico	Normal school diploma or "equivalent"; Art, music, theatre & voc. ed. teachers must have degrees in their field; voc. ed. teachers may		U.S./P.R. citizen "blameless" moral character good health; 18 yrs. old.			P.R. Laws Ann. tit. 18, sec. 264 (1974)

Rhode Island		tests are for grade & time specified. Teachers being certified in 2 fields of science (and not in general science) are exempted from test req. Bd. of Regents has authority to exempt others		Board of Regents for elem. & sec. ed.	(see col. 2)	R.I. Gen. Laws secs. 16-11-1&2, 16-60-4(9)(b) (1981 & Supp. 1983)
South Carolina			loyalty oath	Board	comprehen-sive	S.C. Code Ann. sec. 59-25-20 & 110 & 120 (Law Co-op 1977); 59-26-20 (Supp. 1981)
South Dakota				Board		S.D. Cod. Laws sec. 13-42-1 & 3 (1982)
Tenn-essee	4 yrs. of professional training; + for teachers of K-8, 6 quarter hrs. in methods of teaching reading	in spelling, grammar & other subjects		Board	comprehen-sive	Tenn. Code Ann. secs. 1201, 1203, 1236, 1242 (1977 & Supp. 1982)
Texas		comprehensive		Board	(see col. 2)	Tex. Educ. code ann. secs. 13.032(d) & (e) & 13.045(b) (Vernon Supp. 1984)
Utah		if Board determines to require it		Board or Univ. of Utah School of Ed.	(see col. 2) (no action to date)	Utah Code Ann. secs 53-2-13, 18, 19, 24, & 22 (1981)
Vermont				Board		Vt. Stat. Ann. tit. 16, secs. 164(5) & 1692 (1982)
Virginia		comprehensive (provisional, 2 yr certificate avail. to those who do not meet test req.)	3 yr probation	Board	(see col. 2)	Va. Code secs. 22.1-209, 298, 299 & 303 (1950 & 1980)
Virgin Islands			V.I. resident 18 yrs old	Adm.of Personnel Merit System; with concurrence from Chief & Board; approved by Governor		V.I. Code tit. 17, sec. 121(c) (1976 & Supp. 1983)

Washington				Board		Wash. Rev. code secs. 28A.67.010 & 28A.70.005 (1983)
West Virginia	Bachelor's degree		U.S. Citizen or intend to be citizen; good health; good moral character; 18 yrs old	Board		W.Va. Code secs. 18A-3-1 & 2 (1984)
Wisconsin	Bachelor's degree & prof. training as req'd by Bd. specific subjects req'd for teachers of econ., soc. stud., ag., science; industrial arts teacher must have 3 yrs. experience or 4 yrs. training			Board		Wis. Stat. Ann. secs 118.19 (West Supp. 1984)
Wyoming		const. of U.S. & Wyo. (or completion of course on same)		Board	(see col. 2)	Wyo. Stat. sec. 21-2-304(iii) (1977)

NOTES

Academic requirements are generally specified as being from an approved institution.

"Board" refers to the state board of education, unless a different board is specified. "Chief" refers to the state superintendent of education.